**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE SIDE**

**WRIT PETITION NO.9904 OF 2004**

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Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.

Court's or Judge's orders

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Mr.P.K. Hushing, for the Petitioner

Mr.Amit Kumar Bhowmik, for the Respondent.

**CORAM : F.I. REBELLO,J.**
**DATED : JANUARY 27, 2005**

P.C.

. The present petition is directed against the order of the trial Court dated 20th October, 2004 whereby the petitioner herein has been granted conditional leave to defend in a Summary Suit filed by the Respondent No.1 based on a cheque.

2. It is the case of the petitioner that it is the respondent who had come to him for a loan and that he had agreed to advance the loan. Learned Counsel seeks to place reliance on a letter dated 21st November, 2001 to point out that the loan was to be arranged by him from the market and as the petitioner thereafter felt unsure about the capacity of the respondent to repay he issued stop payment instructions to the bank. Learned Counsel places reliance on a judgment in the case of M/s.Sunil Enterprises and Anr. v. SBI

Commercial and International Bank Ltd., A.I.R,. 1998 S.C. 2317 to contend that as the petitioner has disclosed triable issue he ought to have been granted unconditional leave to defend.

3. On the other hand on behalf of the Respondent the learned Counsel points out that the letter dated 21st November, 2001 was not produced before the trial Court nor was any reference made to the said letter in the application for leave to defend. That letter is fabricated and now created to produce evidence and, therefore, this Court should not consider the same for the purpose of considering the contention of the petitioner herein. It is pointed out that there is no dispute that the cheque was issued by the petitioner in favour of the Respondent. That cheque when deposited has been dishonoured. The presumption, therefore, was on the petitioner to establish that no money had been advanced. In his application for leave to defend the only contention that he has taken is that it is the respondent who had approached him for a loan. There is no contention therein that the petitioner was to organise the loan from the market. The bank statement of account of the petitioner

is on record. That would show that on the date when the cheque was issued there were no amounts lying in the account of the petitioner herein for realisation of the cheque amount.

4. To my mind the defence put is factually sham and an afterthought and as such the trial Court rightly as a matter of mercy granted to the petitioner leave to defend subject to deposit of a sum of Rs.7,70,000/-. I do not find that the order of the trial Court suffers from any error apparent on the face of the record or for that matter there is any failure to exercise jurisdiction. In the light of that there is no merits in the petition.

Petition rejected.

5. Learned Counsel for the petitioner on taking instructions from the petitioner who is present in the Court seeks eight weeks from today time to deposit the amount. Time to deposit the amount is extended by a further period of eight weeks from today. On failure to deposit the amount the trial Court to proceed with the Summons for Judgement and decide the same according to law.

. Personal Secretary of this Court

to issue authenticated copy of this order

to the parties.

**(F.I. REBELLO, J.)**